No. 2758

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. E. ELLIS,

Appellant,

vs.

GEO. C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Appellees.

Appellees' Petition for Rehearing

SMITH, NEWCOMB & WORTHINGTON,

Attorneys for Petitioners.

1212 American Bank Bldg.,
Seattle, Washington.

MOULTON PRINTING CO., SEATTLE, WASHINGTON

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To the Honorable, the Circuit Court of Appeals for the Ninth Circuit:

Having carefully examined the opinion of the Honorable Court, we think that with propriety we may ask the Court to consider whether this case be not one in which it would be proper to grant a rehearing to appellees on the grounds:

I.

That appellees did not have their day in Court or opportunity to present their case as provided by law and by the rules of this Court.

II.

That the allegations of the complaint upon which the decision of this Honorable Court seems to have been based were stricken out by the Trial Court, and were no part of the record on appeal.

Discussing these questions in the above order, the brief of appellant was not served upon appellees until the day the case was called for hearing in this Court, although appellees were induced to stipulate for hearing of said cause on said date on advice by wire that appellant's brief had been sent. Correspondence between counsel for appellant and appellees follows:

March 9, 1916.

T. C. West,
Phelan Bldg.,
San Francisco, Calif.

Dear Mr. West:

Enclosed herewith please find notice of appearance in the case of George C. Treat, et al., vs. H. E. Ellis, appealed from the District Court of the Territory of Alaska, Third Division.

I am advised that you are attorney for Mr. Ellis in this appeal. Will you kindly admit service of the notice of appearance herein and return the same to me, and oblige.

I would also like to have the case transferred to Seattle for hearing if agreeable to you.

I am enclosing herewith stipulation to that effect. If you cannot sign the same, it is all right, but it would be a great accommodation to me.

With personal regards, I am,

Very truly yours,

ES/W. EDMUND SMITH.

April 12, 1916.

T. C. WEST,
Phelan Bldg., San Francisco, Calif.

Dear Mr. West:

Have you prepared your abstract in the case of Treat and others against Ellis in the Court of Appeals? If so, will you kindly serve the same? Also serve your brief as soon as you can, so that we can prepare and serve our brief on or before May 25th, as I see the case is set for that date.

What do you hear about the case of Ballaine vs. Boland, et al.?

Very truly yours,

SMITH, NEWCOMB & WORTHINGTON.

ES/W. By EDMUND SMITH.

April 21, 1916.

T. C. WEST,
Phelan Bldg.,
San Francisco, Calif.

Dear Mr. West:

I wrote you on April 12th in reference to the abstract and brief in the case of Treat and others

against H. E. Ellis. While it is probably a little early for an answer, but I note by the Docket in the Court of Appeals that the case is set for May 25th, and unless it is continued it would give us very short time to prepare and serve our answering brief.

Can you kindly advise me as to what time you can serve us with the abstract and your brief? I should not mention it at this time, but I will probably be called East soon, and my associates, of course, are not so familiar with the record as I am, and if we could secure the abstract and your brief before I leave without inconveniencing you, we would very much appreciate the same.

Very truly yours,

SMITH, NEWCOMB & WORTHINGTON.

ES/W. By EDMUND SMITH.

May 10, 1916.

EDMUND SMITH,
Attorney, American Bank Building,
Seattle, Wash.

My brief Ellis Treat in printer's hands, will forward ample of days will you consent to argument going over till end of term, about June first? Will give longer time for you to reply and accommodation to me.

T. C. WEST.

May 11, 1916.

T. C. WEST,
Attorney at Law,
Phelan Bldg.,
San Francisco, Calif.

Extension time argument Ellis Treat to May thirty provided you serve brief by seventeenth.

We have twenty-ninth serve brief provided case submitted this term. Money tied up do not care to go over term. Rules time answer briefs too short this distance. Wire if conditions satisfactory.

EDMUND SMITH.

May 17, 1916.

EDMUND SMITH,
Atty., American Bank Bldg.,
Seattle, Wash.

Ellis case over to thirty-first, sending my brief send yours by thirtieth, all right.

T. C. WEST.

May 18, 1916.

T. C. WEST,
Phelan Bldg.,
San Francisco, Calif.

Wire received. Supposed to have your brief seventeenth. Will need few days prepare answering brief necessarily. If on the way all right.

EDMUND SMITH.

May 12, 1916.

EDMUND SMITH,
Attorney, American Bank Bldg.,
Seattle, Wash.

Telegram received. Time satisfactory will have argument put over to thirtieth or thirty-first so as to be submitted this term.

T. C. WEST.

May 23, 1916.

T. C. West,
Phelan Bldg.,
San Francisco, Calif.

Briefs Ellis case not received. Give date you mailed them.

Edmund Smith.

New York, June 8, 1916.

T. C. West, Esq.,
Phelan Bldg.,
San Francisco, Calif.

Dear Mr. West:

In my correspondence with the firm in Seattle they have not mentioned the receipt of your brief in the case of Ellis vs. Treat et al. Mr. Ritchie wired me from San Francisco that you had served a brief on him. I would like to have about three copies of the same if you can spare them. If you would have your clerk mail one copy to me at the Wolcott Hotel, 5th Ave. & 31st Street, New York City, and two copies to my office in Seattle I would very much appreciate the same. Also if you decide to serve reply briefs kindly mail same as above and by doing so you will greatly oblige, and I will try to reciprocate in any way that I can.

Very truly yours,

ES/MC Edmund Smith.

Sept. 7, 1916.

T. C. West,
Phelan Bldg.,
San Francisco, Calif.

Dear Sir:

I have written several times for copies of your brief in the case of Treat vs. Ellis. Would you

please send me by return mail a copy of your original brief and also reply brief, if one was filed. We have never received a copy of either.

You will confer a favor upon me by mailing them to me by return mail.

Yours very truly,

ES/W. EDMUND SMITH.

Sept. 11th, 1916.

EDMUND SMITH, ESQ.,
Attorney,
Seattle, Wash.

Treat vs. Ellis.

My Dear Smith:

By concurrent mail I am sending you copies of my brief in this case. I mailed a couple of copies to you at the time it was filed but evidently they went estray in some manner.

I am also sending you a copy of the decision which will save you the trouble of sending for it.

Yours very truly,

T.C.W. T. C. WEST.

The above is correct copy of the correspondence between counsel for appellant and counsel for appellees in reference to serving and filing briefs herein.

That by reason of the failure of counsel for appellant to serve the brief of appellant as provided by the rules of this Court, and the stipulation

of the parties above set out, appellees were compelled to prepare, serve and file their answering brief without knowledge of the contents of appellant's brief and without opportunity of answering the same. (See preliminary statement in appellees' brief.)

Referring to the second proposition, viz., that the allegations of the complaint upon which the decision of this Honorable Court seems to have been based, were sticken out by the trial Court, and were no part of the record on appeal. The opinion of this Honorable Court that the complaint does not state facts sufficient to constitute a cause of action, seems to be based on the provisions of the written contracts between plaintiffs Treat and Smith and the defendant of date May 15, 1907, Exhibit "A" of plaintiff's complaint, and the contract of July 9, 1908, set out in full as part of Paragraph V of plaintiff's complaint, and especially the contract of July 9, 1908, the theory of the Court seems to be that plaintiffs were seeking to specifically enforce said contract and especially the provisions therein in regard to the incorporation of the Mystic Gold Mining Company; but as shown by the abstract, pages 214, 215 and 216, all that part of the complaint was stricken, and that

our position herein may be clear to the Court, we are submitting herewith a copy of the complaint as amended, omitting the formal parts:

Come now the above named plaintiffs, and for cause of suit against the above named defendant, alleges as follows, to-wit:

I.

That on the 15th day of May, 1907, the defendant was the sole and legal owner of those certain eight (8) lode mining claims, situate on the northerly side of Valdez Bay, between Gold Creek and Shoups Bay, in the Valdez recording precinct, Territory of Alaska, named and described as follows:

The Mystic No. 1 lode claim, notice of location of which is of record in Book K of Mining Locations, at page 506, of the records of said Valdez recording precinct, at Valdez, Alaska.

The Mystic No. 2 lode claim, notice of location thereof being of record in said Book K, at page 505, of said records.

The Mystery No. 1 lode claim, notice of location thereof being of record in Book O of Mining Locations, at page 452, of said records.

The Mystery No. 2 lode claim, notice of loca-

tion thereof being recorded in said Book O, at page 453, of said records.

The Mystery No. 3 lode claim, notice of location thereof being recorded in said Book O, at page 605, of said records.

The Parallel No. 1 lode claim, notice of location thereof being of record in said Book O, at page 607, of said records.

The Parallel No. 2 lode claim, notice of location thereof being of record in said Book O, at page 606, of said records.

The High Bar lode claim, notice of location of which is of record in said Book O, at page 451, of said records.

That the legal title to each and all of said mining claims ever since the said 15th day of May, 1907, has been and now is in the name of said defendant.

II.

That on the said 15th day of May, 1907, said defendant and plaintiffs Treat and Smith entered into a contract in writing concerning "Mystic No. 1" lode claim above described, this being the most valuable of said mining claims; said "Mystic No. 1" lode claim is described in said contract as "Mystic Lode Mining Claim." That under the terms of

said written contract plaintiffs Treat and Smith advanced to defendant the sum of Five Hundred Dollars ($500) for the purpose of enabling the defendant to mine and ship to the Tacoma smelter, at Tacoma, Washington, five tons of ore from said mining claim, for the purpose of a test of said ore, and said plaintiffs were to receive twenty-five per cent of the net returns of said shipment, together with re-payment to them of the said sum of Five Hundred Dollars so advanced, and, in case seventy-five per cent of the net returns of said shipment was not sufficient to repay said sum of Five Hundred Dollars to plaintiffs, then plaintiffs, under the terms of said contract, were to have, and said contract was to be construed as, a mortgage on said mining claim until they were fully repaid the said sum of Five Hundred Dollars.

A copy of said contract is hereto attached, marked Plaintiff's Exhibit "A," and made a part of this complaint.

III.

That, pursuant to the terms of said contract, plaintiffs Treat and Smith, on or about the 15th day of May, 1907, did advance to defendant the sum of Five Hundred Dollars, and thereafter and during the year 1907, defendant did mine from

said mining claim five tons of ore, more or less, and ship the same to the Tacoma smelter. That the returns from said shipment of ore did not pay transportation and smelter charges, and plaintiffs Treat and Smith did not receive any profit from said shipment, nor did they receive any part of said sum of Five Hundred Dollars advanced to defendant as aforesaid. That defendant was without money or means to continue mining and shipping ore from said claim, and the full sum of Five Hundred Dollars remained due and owing from defendant to plaintiffs Treat and Smith at the date of the next contract between the defendant and plaintiffs Treat and Smith, which contract is hereinafter set out.

IV.

That at the date of the next contract between defendant and plaintiffs Treat and Smith and which is hereinafter set out, the defendant was indebted to plaintiff Treat on a certain promissory note, dated December 15, 1905, for the sum of Two Hundred Dollars, bearing interest from date at the rate of twelve per cent per annum, which said note was secured by a mortgage, executed by defendant to said Treat on certain real property in the town of Valdez, Alaska, which said note was

long past due and the amount of said note and interest thereon on the 9th day of July, 1908, the date of the next contract hereinafter set out, was Two Hundred Sixty-one Dollars, which said sum was then due and owing from defendant to plaintiff Treat.

V.

That on the 9th day of July, 1908, defendant entered into a contract in writing with plaintiffs Treat and Smith in words and figures as follows, to-wit:

"CONTRACT.

THIS CONTRACT AND AGREEMENT made and entered into this 9th day of July, 1908, by and between H. E. Ellis, party of the first part, and George C. Treat and Edmund Smith, parties of the second part, all of Valdez, Alaska, WITNESSETH:

That the said party of the first part is the owner of eight (8) gold mining claims, situated on the North side of Valdez Bay and about ten (10) miles from Valdez, Alaska, the location certificates of which are of record in the office of the United States Commissioner at said Valdez, Alaska.

In consideration of the covenants hereinafter mentioned, and to be fully kept and performed by the parties of the second part, the said party of the first part agrees to deed to the Mystic Gold Mining Company, a corporation hereinafter to be formed, the said eight gold mining claims, in consideration of the issuance to him of all of the capital stock of said corporation.

That said first party will then transfer to the parties of the second part twenty (20) per cent of said capital stock, and will turn over to the Treasury of the said corporation twenty (20) per cent of said stock to be sold by said Treasury as may be directed by the board of directors of said corporation, the money received from the sale of said twenty (20) per cent of said stock being the treasury stock as aforesaid or so much thereof as may be sold to be used in establishing a reduction plant upon said mining claims and the development of said claims.

That in consideration of the twenty (20) per cent issued to the parties of the second part, the said parties of the second part are to pay all expenses of incorporating said company, recording and filing all necessary papers thereon, and receipt in full all claims that said parties of the second part, or either of them, have against the said party of the first part; also to give their time and attention in selling the amount of treasury stock necessary to be sold, and give whatever time and and attention that may be necessary to the proper organization of said corporation and the sale of said stock.

In Witness Whereof, the parties have hereunto set their hands this 9th day of July, 1908.

H. E. Ellis,
Geo. C. Treat,
Edmund Smith.

In presence of:
B. B. Lockhart.

United States of America, Territory of Alaska, ss.

Be it Remembered that on this 9th day of July, 1908, before me, a Notary Public in and for the Territory of Alaska, personally appeared H. E. Ellis, George C. Treat and Edmund Smith, known

to me to be the persons described in and who executed the foregoing Contract, and each duly acknowledged to me that he signed the same for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

B. B. LOCKHART,
(Notarial Seal) Notary Public."

That the mining claims referred to in the foregoing contract as

"(8) gold mining claims, situate on the North side of Valdez Bay and about ten (10) miles from Valdez, Alaska, the location certificates of which are recorded in the office of the United States Commissioner at Valdez, Alaska,"

are the eight mining claims described in the first paragraph of this complaint, that the consideration of said contract heretofore in this paragraph set out, and described therein as "claims that said parties of the second part, or either of them, have against the said party of the first part," to said contract, were the sums of Five Hundred Dollars theretofore advanced by plaintiffs Treat and Smith to defendant, as aforesaid, and the promissory note heretofore described held by plaintiff Treat against defendant, the total amount of said claims being Seven Hundred Sixty-one Dollars ($761).

VI.

That on the execution of the contract last set out, plaintiffs Treat and Smith did release defendant from and receipt to him in full for said sum of Five Hundred Dollars, and plaintiff Treat surrendered and delivered said promissory note to defendant and released him from all obligation thereon. That shortly thereafter plaintiffs Treat and Smith caused to be prepared the necessary papers for the formation of the corporation provided for in said contract, and were ready, able and willing at all times to proceed to the complete formation of said corporation, and to pay all expenses of incorporating said company and recording and filing of all necessary papers in any manner connected therewith, and to perform each and all of the other things to be done and performed by them under the terms of said contract. That it was understood and agreed at the time of the execution of said contract that each of the parties thereto was to be one of the incorporators and would sign and execute the Articles of Incorporation when it was decided to form said corporation.

That after the execution of the contract of July 9, 1908, set out in the fifth paragraph of this complaint, owing to the stringency of the money

market and the probable difficulty that would be experienced in selling the treasury stock of said corporation to an advantage, it was decided by all of the parties to said contract to await a more opportune time to form said corporation, and while so waiting, during which time plaintiffs Treat and Smith were endeavoring to procure a purchaser for the treasury stock of said corporation when the same should be organized said Treat and Smith procured from one A. J. Crane an offer to lease said mining claims. That thereupon defendant Ellis and plaintiffs Treat and Smith agreed mutually to enter into a contract with the said A. J. Crane to lease all of said mining claims to said Crane.

VII.

That, pursuant to said agreement, on the 5th day of June, 1909, defendant and plaintiffs Treat and Smith, as parties of the first part, entered into a contract with said Crane, as party of the second part, giving and granting to the said Crane an option to lease each and all of said mining claims for a period of six years, at a rent or royalty of twenty per cent of the net product or proceeds for the first year and twenty-five per cent of said net proceeds for the remaining term of said lease, and providing that eighty-five per cent of said rent or

royalty should be paid to defendant Ellis, and the remaining fifteen per cent of said royalty should be paid to plaintiffs Treat and Smith. That a copy of said contract with Crane is hereto attached, marked Plaintiff's Exhibit "B," and made a part of this complaint.

That at the time of the negotiations which resulted in the contract described as Plaintiff's Exhibit "B," the said defendant Ellis insisted on a higher rent or royalty than that named in the contract, and the said Crane refused to agree on a higher royalty, and thereupon plaintiffs Treat and Smith, believing the lease to be advantageous, agreed that defendant should have eighty-five per cent of said royalty instead of eighty per cent thereof to which percentage he was entitled at that time as the owner of eighty per cent of said mining claims, in order to induce defendant to enter into said lease.

VIII.

That thereafter by mesne conveyances B. F. Millard became assignee of the contract between plaintiffs Treat and Smith and defendant Ellis with said Crane, a copy of which contract is attached hereto and marked Plaintiff's Exhibit "B"

and thereafter on the 23rd day of July, 1909, defendant and plaintiffs Treat and Smith, as owners of each and all of said mining claims, entered into a lease of each and all of said mining claims with B. F. Millard, pursuant to the terms of the contract marked Plaintiff's Exhibit "B" heretofore referred to. That said lease to said B. F. Millard provided, among other things, that at the termination of said lease all machinery, tools, equipment and improvements placed upon said mining claims by said lessee, his successors or assigns, should, at the termination of said lease, be left upon the property and become the property of the lessors. That copy of said lease with B. F. Millard is hereto attached and marked Plaintiff's Exhibit "C", and made a part of this complaint. (See abstract page 20.)

IX.

That thereafter on the 4th day of August, 1909, the said B. F. Millard assigned and transferred said lease to the Cliff Mining Company, a corporation, and thereupon said Cliff Mining Company entered into the possession of said mining claims and operated them under said lease until on or about the 15th day of August, 1914, at which time the said Cliff Mining Company surrendered

the possession of said claims and the machinery, tools, equipment and improvements placed thereon to the lessors in said lease, to-wit, defendant Ellis and plaintiffs Treat and Smith.

X.

That during the time the said Cliff Mining Company was operating said mining claims it placed thereon a large amount of valuable mining machinery, tools, buildings and equipment, of the value of more than Thirty Thousand Dollars, which said machinery, tools, buildings and equipment are now upon said mining claims. That the plaintiffs herein, as the owners of twenty per cent interest in said mining claims, and under the terms of said lease, are now the owners of twenty per cent interest in and to said tools, machinery, buildings and equipment.

XI.

That on or about the 3rd day of January, 1913, the plaintiff Logan Archibald purchased from plaintiff Edmund Smith an undivided one-half of said Smith's interest in and to each and all of said mining claims and in and to all of the rights and privileges accruing to the said Smith by reason of

the contracts hereinbefore mentioned and set out, and said plaintiff Archibald is now and ever since on or about the said 3rd day of January, 1913, has been the owner of one-half of the interest formerly belonging to said plaintiff Smith.

XII.

That plaintiff Treat is now the owner of an undivided one-tenth interest, plaintiff Smith is the owner of an undivided one-twentieth interest, and plaintiff Archibald is the owner of an undivided one-twentieth interest in and to each and all of the said mining claims and in and to all of the machinery, tools, equipment and buildings and improvements thereon. That defendant Ellis, during all of the time hereinbefore mentioned since the execution of the contract of the 9th day of July, 1908, heretofore in the fifth paragraph of this complaint set out, until about the month of February, 1915, never questioned or disputed the right and title of plaintiff to said premises and property as herein stated, but during all of said time recognized and approved said claim of title by plaintiffs as herein stated.

XIII.

That ever since the surrender of said prop-

erty by said Cliff Mining Company to the lessors named in Plaintiff's Exhibit "C," defendant Ellis has remained without the Territory of Alaska, residing in the States of Colorado and Montana, and has refused to deed to plaintiffs an undivided twenty per cent interest in and to each and all of said mining claims, and during or about the month of February, 1915, said defendant Ellis disputed the claim of title of plaintiffs and denied that plaintiffs herein have any right, title or interest whatever in or to said mining claims, or in or to said machinery, tools, equipment, buildings and improvements. And said defendant is now threatening and attempting to transfer the title to each and all of said mining claims to parties other than the plaintiffs herein in violation of the contracts and agreements aforesaid, and is threatening to sell and remove the machinery, tools, equipment and buildings now upon said property as aforesaid without recognizing plaintiffs' right, title or interest in and to said property, or any part thereof, and unless enjoined by order of this Court defendant will make said transfer.

WHEREFORE, Plaintiffs pray a decree of this Court as follows:

First. That defendant deed to plaintiffs Treat

and Smith each an undivided one-tenth interest in and to each and all of said eight mining claims.

Second. That the plaintiffs herein be adjudged and decreed to be the owners of an undivided one-fifth interest in and to all machinery, tools, equipment, buildings and improvements placed upon said mining claims by the Cliff Mining Company, in the following proportions: Geo. C. Treat, an undivided one-tenth interest; Edmund Smith, an undivided one-twentieth interest; Logan Archibald, an undivided one-twentieth interest.

Third. That defendant, his agents, attorneys and employees, be enjoined and restrained from selling or removing any of said machinery, tools, equipment or buildings pending this suit.

Fourth. That defendant be enjoined from transferring the title of each and all of said mining claims, and from leasing or encumbering said mining claims pending the final determination of this suit.

Fifth. For such other and further relief as to the Court may seem just and equitable.

Sixth. That plaintiffs have judgment against the defendant for their costs and disbursements in this action.

DONOHOE & DIMOND, and
LYONS & RITCHIE,
Attorneys for Plaintiffs.

In the complaint as amended and as it originally stood, plaintiffs allege that they are the owners of an undivided twenty per cent or one-fifth interest in the property described in said complaint. (See Paragraph VIII and Exhibit "B" part of said paragraph, also Paragraphs IX, X, XI and XII.) Originally the complaint was in the alternative and the prayer asked for alternative relief. We believe in practically all the jurisdictions of the United States a pleading that plaintiff is the owner of the real estate which is the subject of litigation is good in the absence of a motion to make more definite and certain. The contracts were pleaded as explanatory of the various steps leading up to the final agreement at the time of the signing of the Crane contract, whereby plaintiffs were to have an interest in the specific property in lieu of the twenty per cent interest in the stock of the corporation.

The contracts are also important for the purpose of showing a consideration.

We believe also that it is practically a uniform rule in all jurisdictions that where the question of the sufficiency of the complaint to state a cause of action is raised after verdict or decision, and a trial on the merits, every reasonable presumption

will be indulged in to sustain the complaint. Another legal presumption which we believe is practically uniform, is that if the parties to the suit try the case before the Court on a certain theory, even though that theory is somewhat at variance with the issues raised by the pleadings, the trial and appellate Courts will recognize the theory upon which the case was tried and in the language of the statute render its decisions according to the facts found.

In this case the issues as to the ownership of said interest in and to said mining claims was fully set forth in the complaint and denied in the answer. (See Paragraphs 6, 8, 12 and 13 of Defendant's Answer; also Defendant's Affirmative Defense, pages 36, 39, 41, 43 and 47, Abstract.)

The case was fully tried on the theory of plaintiffs' claim of ownership of an undivided one-fifth interest in the property described in the complaint. The identity of the property being specifically admitted, the plaintiffs contending that at the time of the Crane contract the agreement of the parties was orally changed by plaintiffs waiving their rights under the agreement of July 9th, 1908, for a twenty per cent interest in the specific property. This statement is fully borne out by defend-

ant by the introduction of Defendant's Exhibit No. 9, being the letter written by plaintiffs to defendant, at his request, as to what they were willing to accept for their "one-fifth interest in the property," the defendant basing his defense on the construction of Exhibit 9.

The provisions of the Alaska Code, as to variance between the pleading and proof, is as follows:

Sec. 919. No variance between the allegation in a pleading and the proof shall be deemed material unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

Whenever it shall be alleged that the party has been so misled that fact shall be proved to the satisfaction of the Court, and in what respect he has been misled; and thereupon the Court may order the pleading to be amended upon such terms as may be just. (See Compiled Laws of the Territory of Alaska, 1913, and authorities cited under said section.)

Section 920 provides: When the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. (And cases cited.)

The entire record herein shows that the complaint alleged the ownership of plaintiffs, which allegations were denied by the answer, and that the case was tried on the theory of plaintiffs' claim of ownership of an undivided one-fifth interest in and to the mining claims described in the complaint, and that that ownership was acquired by oral agreement in consideration of releasing the defendant from the written contracts above referred to, and that the plaintiffs remained in possession thereunder for several years; and the evidence specifically shows that all parties acted on this theory, plaintiffs paying their pro rata amount for surveying the claims for patent and the expense of litigation with an adverse claimant for a part of said property and permanent improvements placed thereon, and that the only theory considered by the trial Court or by the parties at said trial was the plaintiffs' claim of ownership, and notwithstanding the imperfection in the complaint, the trial Court, acting under the above provisions of the statute, "found the facts according to the evidence."

If it be conceded that the complaint was faulty in not specifically setting forth the plaintiffs' deraignment of title, or other particulars, such defects were waived by not moving to require the complaint

to be made more definite and certain and by answering, and putting the question of ownership clearly in issue and the trial of the cause on that theory. As appears by the record, no claim or proof by defendant that he had been misled to his prejudice, it should be considered by the appellate Court that the lower Court, following the mandate of the statute, "found the facts according to the evidence."

It is clearly apparent from the evidence and the entire record in the case that defendant, after acquiescing in plaintiffs' ownership of this interest for several years, and receiving and accepting their pro rata contributions to surveys for patent, costs and expenses of suit by adverse claimants, and permanent improvements, suddenly discovered that Defendant's Exhibit 9 (Transcript, pages 237, 238) might possibly be construed as an agreement to accept the 15 per cent royalty in full satisfaction of plaintiffs' rights, and that this theory induced the defendant to attempt, at that late date, to defeat the rights of the plaintiff.

The Court in its opinion refers to the amount received by the respective parties as royalties. It will, however, conclusively appear from the evidence that the property had no known value at the time plaintiffs Treat and Smith advanced the

$500.00, and that the use of this money on the property demonstrated the only value shown to exist prior to making the contract with Crane.

From every viewpoint, the record, and the evidence in the case, every possible equity stands in favor of plaintiffs' claim.

The complaint further alleges and proof seems conclusive that plaintiff Archibald, for a valuable consideration, purchased a one-half interest claimed by plaintiff Smith, as the lease, Exhibit "C," was of record, and stated that Smith was the owner of an undivided one-tenth interest in said property. This acknowledgement in a solemnly executed and recorded instrument certainly estopped the defendant from questioning the title of Archibald for the reason that the statement contained in the lease as to the ownership, if not sufficient to bind defendant, as to Treat and Smith, it seems should be considered a sufficient estoppel in favor of an innocent purchaser.

As counsel has just received the data for this petition from Alaska on the 9th of October, and time for filing petition for rehearing is limited to October 16th, we will omit further argument and cite a few authorities on the points above mentioned.

"A complaint which alleges that defendant (plaintiff's landlord) prevented plaintiff from removing from his farm, and converted to his own use, so much hay and potatoes which plaintiff had cut and planted while tenant, whereby plaintiff had been damaged in the amount claimed, but fails to aver in direct terms that plaintiff is the owner and contains no valuation of articles, though bad pleading, will not be held defective after verdict."

McKay vs. Musgrove, et al., 13 Pac. 770 (Oregon Case. Alaska Code of Procedure taken from Oregon.)

"Defendant alleges that the description of the property in the lease is too indefinite to enable the Court to enter a decree for the specific performance of the agreement to extend the lease. It is to be observed that the lots 293 and 294 are not specifically described in the contract made in February, 1901, but in the supplementary contract in September, 1902, this uncertainty was supplied by the reference to the February contract as being contracts for the leasing of the four lots mentioned. It is the rule that where a contract is ambiguous the Court will generally follow the interpretation placed upon the same by the parties themselves."

Gorder & Son vs. Pankonin, 119 N. W. 449, citing *Davis vs. Ravenna Creamery Co.,* 48 Neb. 471, and other cases.

Thompson vs. Fire Co., 155 Fed. 548.

"The defendants' contentions are, in substance, that the agreement between Fohey and the plaintiff, made on April 28, 1906, is so indefinite, uncertain and vague that it is not enforceable as a land contract, and that the evidence admitted by the

Court, showing the circumstances under which it was made, and the subsequent acts of the parties construing its terms by their acts, was not admissible. The written contract is certainly indefinite in several particulars, especially in respect to the description of the real estate intended to be covered by it. If the Court had no further information than that given by the writing on its face, it seems probable that it would be impossible of enforcement, because of its indefinite terms. But where parties have attempted to reduce an agreement to writing, and such writing is in some respects indefinite or ambiguous, the contract does not necessarily fail, nor will a party suing upon it be denied relief. If, by aid of evidence showing the situation and surroundings of the parties at the time, and their subsequent acts, if any, construing the terms of the writing, the Court can with reasonable certainty determine the meaning intended by the parties, the Court will not allow the contract to fall, but will construe it in the light of such evidence, and enforce its terms as so construed, if there be no other fatal objections to it. This principle is so well established that discussion of it, or citation of authorities in its support, seems hardly necessary, but reference is made to *Excelsior Wrapper Co. vs. Messenger,* 116 Wis. 549, 93 N. W. 459 (where the authorities on this general subject are collated), and to the case of *Doctor vs. Hellberg*, 65 Wis. 415, 27 N. W. 176. The Court rightly received such evidence in the present case, and there can be no doubt that the Court arrived at a correct conclusion as to the proper construction of the contract."

Inglis vs. Fohey, 116 N. W., page 858.

See also *Small vs. N. P. Ry.*, 20 Fed., page 753.

"After verdict or judgment an objection that the petition fails to state facts sufficient to constite a cause of action is tenable only where pleading fails to allege the substance of a cause of action though demurrable before answer or judgment."

In re First National Bank, 152 Fed. 64.

"Courts will enforce oral agreements if part or full performance on one part."

Snowby et al. vs. Bunton, 118 Mass. 279.

Warren vs. Wood, 200 Fed. 542.

Under a contract by which defendant agreed to assign to plaintiff one-fourth interest in any mine purchased by him within a specified time the fact that defendant purchased a one-fourth interest in a mine, the ownership of which was evidenced not by the legal title, but by certificates of stock showing a beneficial interest, does not enable him to evade his obligations to plaintiff who accepts this purchase in fulfillment of the contract.

Dennison vs. Chapman, 105 Cal. 447, 39 Pac. 61.

The latter case is further analogous to the case at bar as this was an original agreement for specific interest in mining property. The Court enforced the delivery of stock of the corporation.

"The allegation that plaintiff is the owner of

property described is sufficient except in motion to make more definite and certain."

Brosnon vs. White, 136 Fed. 74 (Alaska case).

Thompson vs. Fire Co., 155 Fed. 548.

We would also respectfully call the attention of the Court to

Hoogendorn vs. Daniel, 178 Fed. 765 (Alaska case).

"Courts should enforce specific performance of contract, notwithstanding the property has largely increased in value."

Meehan vs. Nelson, 137 Fed. 731 (Alaska case).

Railroad Company vs. Coney Island, 144 N. Y. 152; 39 N. E. 17.

That by reason of lack of time as above stated, we have not prepared this petition as extensively as we should like to do if we had more time. We insist, however, that from the record in the case and the evidence adduced at the trial, the decree of the District Court of Alaska, Third Division, should be affirmed and that a rehearing should be granted herein. That if this Honorable Court still believes that the complaint is insufficient, the cause should be remanded for a new trial giving plaintiffs

an opportunity to formally amend their complaint to conform to the facts proven.

Respectfully submitted,

SMITH, NEWCOMB & WORTHINGTON,

Attorneys for Petitioners.

I, L. V. Newcomb, of Counsel for the appellees herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

L. V. NEWCOMB.